

NO. PD-1360-17

**IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS**

FILED
COURT OF CRIMINAL APPEALS
5/8/2018
DEANA WILLIAMSON, CLERK

**WALTER FISK,
Appellant**

vs.

**THE STATE OF TEXAS,
Appellee**

Petition in Cause No. 2014-CR-3772 from the
227th District Court of Bexar County, Texas
And the Court of Appeals for the
Fourth Court of Appeals District of Texas

BRIEF FOR APPELLANT

ORAL ARGUMENT REQUESTED

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Statement Regarding Oral Argument

This Honorable Court has granted the State's request for oral argument contained in its petition for discretionary review. The Appellant also requests oral argument.

Record References

There are two volumes in the reporter's record of the hearing being appealed. References to the reporter's record will be thus: (RR 1, ____). References to the clerk's record will be thus: (CR, ____). The initial reference to the testifying witness will be in **bold type**.

For a summary of the underlying facts of this case, the Court is referred to the appellate opinion of the first appeal of this case, *Fisk v. State*, 510 S.W.2d 165 (Tex. App. – San Antonio 2016, no pet.) (*Fisk I*).

TO THE COURT OF CRIMINAL APPEALS OF TEXAS:

This brief is filed on behalf of Appellant, Walter Fisk, by Michael D. Robbins, Assistant Bexar County Public Defender.

Statement of the Case

Appellant Walter Fisk was charged by indictment in Cause No. 2014-CR-3772 with four counts of indecency with a child by contact. One of the counts was waived and abandoned by the State. (CR, 7). The case was tried to a jury, which convicted Mr. Fisk of all three submitted counts. (CR, 103-105). Appellant elected that the court assess punishment in case of conviction. (CR, 86-87; 88). The court, finding that the military law under which Appellant was previously convicted was substantially similar to relevant provisions of the Texas Penal Code, assessed three mandatory life sentences,¹ which were ordered to run consecutively. (CR, 126-131, 137-140). The original case was appealed. This Fourth Court of Appeals affirmed the convictions, but reversed and remanded for new sentencing hearing. *Fisk v. State*, 510 S.W.3d 165 (Tex. App. – San Antonio 2016, no pet.) (*Fisk I*).

Following the hearing on remand, the trial court again sentenced Mr. Fisk to three consecutive life sentences (RR 1, 36-37), entering findings of fact and

¹ See TEX. PENAL CODE § 12.42(c)(2)(B)(v).

conclusions of law. (CR, 175-179). The trial court certified that this is not a plea bargained case and that Mr. Fisk has the right to appeal. (CR, 180). Mr. Fisk timely filed notice of appeal. (CR, 190). The Fourth Court of Appeals again reversed the sentence and remanded for a new sentencing hearing. *Fisk v. State*, 538 S.W.3d 763 (Tex. App. – San Antonio 2017, pet. granted) (*Fisk II*).

This Honorable Court granted the State’s petition for discretionary review on the following issues:

1. The current test for determining whether and out-of-state offense is substantially similar to an enumerated Texas offense is too broad. Accordingly, this Court should disavow that test and replace it with one that only compares the elements of the respective offenses.
2. Even if not disavowed, the court of appeals misapplied the current test when it concluded that the military’s former sodomy-with-a-child statute is not substantially similar to Texas’s sexual assault statute.

Statement of Facts Relevant to Substantial Similarity Issues

A sentencing hearing on remand.

At the beginning of the hearing, the trial court took judicial notice of a 1990 court-martial order against Mr. Fisk, which was previously filed as a business record. (CR, 113-115; RR 1, 5; RR 2, SX P-3). The court also took judicial notice of 1984 version of the Uniform Code of Military Justice. (RR 1, 5-6).

Jacquelyn Christilles was an attorney working in the Bexar County District Attorney's Office. She previously worked a Joint Base San Antonio Randolph and was an Assistant Staff Judge Advocate for the United States Air Force. (RR 1, 17). She identified copies of the court-marital order, Article 125 of the Uniform Code of Military Justice, and Section 22.011 of the Texas Penal Code. (RR 1, 18; RR 2, SX P-1 – SX P-3).

Ms. Christilles explained that the court-martial order of June 25, 1990, became final on March 26, 1992, following appeal. (RR 1, 19-20; RR 2, SX P-3). Ms. Christilles described Article 125 of the Uniform Code of Military Justice as it existed at the time of Mr. Fisk's court-martial.² This will be discussed in detail in the Argument section of this brief, below. (RR 1, 21-24). Ms. Chistilles next considered the Texas sexual assault statute, TEX. PENAL CODE § 22.011. In her opinion, the Texas statute was substantially similar to the military article. (RR 1,

² 10 U.S.C. § 925 (1968).

25). She made an element-by-element comparison, which will not be repeated here, but will also be covered in the Argument section of this brief. (RR 1, 25-27).

The attorney for the State advised the trial court that the State was not attempting to compare the military sodomy statute with indecency with a child by contact, even though that was the offense for which Mr. Fisk was convicted in Texas. (RR 1, 31). Following argument by the State (RR 1, 32-35), defense counsel argued, *inter alia*, that Article 125 is not substantially similar to the Texas sexual assault statute (“we think that the likeness issue that the Court of Appeals referred to is not present in this case”). (RR 1, 35).

The trial court found that the military offense of sodomy was substantially similar to Section 22.011 of the Texas Penal Code. (RR 1, 36). The court accordingly sentenced Mr. Fisk to life in each of the three counts under which he was convicted, the sentences to run consecutively. (RR 1, 36-37). The trial court additionally signed and filed findings of fact and conclusions of law. (CR, 175-179).

The court of appeals reversed the sentencing order and remanded the case for a new sentencing hearing. *Fisk v. State*, 538 S.W.3d 763 (Tex. App. – San Antonio 2017, pet. granted). The Court of Criminal Appeals granted the State’s petition for discretionary review.

Summary of the Argument

This Court should not constrict the test for substantial similarity between Texas and out-of-state offenses. The elements of the offenses should be considered, as well as the public interests protected, and in impact of the elements on the seriousness of the offenses. This Court's analysis in *Prudholm v. State*,³ took into account the objectives of the Texas Penal Code, and there is no reason to abandon that construct.

The court of appeals properly applied the *Prudholm* test in this case. Its analysis and conclusion that Mr. Fisk's prior military conviction for sodomy was not substantially similar to sexual assault under Texas law were substantially correct.

³ 333 S.W.3d 590 (Tex. Crim. App. 2011).

Argument

State's First Issue Presented for Review

The current test for determining whether an out-of-state offense is substantially similar to an enumerated Texas offense is too broad. Accordingly, this Court should disavow that test and replace it with one that only compares the elements of the respective offenses.

The “two strikes” law.

The Texas “two strikes” law mandates a life sentence following conviction of certain sexual offenses. For example, if the defendant was convicted in Texas of one of certain enumerated sexual offenses, including indecency with a child by contact under TEX. PENAL CODE § 21.11, and if the defendant was previously convicted of certain enumerated sexual offenses, the defendant “shall be punished by imprisonment in the Texas Department of Criminal Justice for life [].” TEX. PENAL CODE § 12.42(c)(2). The rule applies to prior out-of-state convictions if the defendant was convicted “under the laws of another state containing elements that are substantially similar to the elements” of enumerated Texas offenses, including sexual assault of a child. TEX. PENAL CODE § 12.42 (c)(2)(B)(v). The “laws of another state” include military convictions under the Uniform Code of Military Justice (UCJM). *Rushing v. State*, 353 S.W.3d 863, 863-64 (Tex. Crim. App. 2011).

The *Prudholm* test.

The legislature did not define “substantially similar elements” in Section 12.42(c). This Court interpreted and defined the phrase in *Prudholm v. State*, 333 S.W.3d 590 (Tex. Crim. App. 2011), in a unanimous opinion. This Court held that “the elements being compared pursuant to Penal Code Section 12.42(c)(2)(B)(v) must display a high degree of likeness, but may be less than identical.” *Id.* at 594. This Court next addressed the “critical question of the respect in which the elements must display a high degree of likeness.” *Id.* This Court looked to the provisions of Penal Code guiding construction of the Code, and held that, “[T]he elements must be substantially similar with respect to the individual or public interests protected and the impact of the elements on the seriousness of the offense.” *Id.* at 594-95.

Two years after *Prudholm*, this Court again visited the issue of substantial similarity in *Anderson v. State*, 394 S.W.3d 531 (Tex. Crim. App. 2013). This Court unanimously reaffirmed its prior holding. *Id.* at 535-36. The Court clarified the second prong of the *Prudholm* analysis. The first step of that prong determines whether the Texas law and the out-of-state law try to prevent a similar danger to society. *Id.* at 536. The second step determines whether the class, degree, and punishment range for the two offenses are substantially similar. *Id.*

The rationale for the second prong of *Prudholm*.

The State's brief urges that there is little analysis in *Prodholm* about why the second prong of the test was added. (State's Brief, 15). This Court, however, did provide its rationale for the second prong. The Texas "two strikes" law does not define "substantially similar." This Court crafted the "high degree of likeness" prong, but also considered it "critical" to define how the out-of-state elements must display a high degree of likeness to the Texas elements. *Pruhdolm*, 333 S.W.3d at 594. This Court looked to the Penal Code itself to inform its statutory construction of the "two strikes" statute. Specifically, Section 1.02 of the Code sets forth the objectives of the Code. This Court found that the objectives suggested an answer to the question of what is a high degree of likeness.

TEX. PENAL CODE § 1.02 provides in pertinent part:

The general purposes of this code are to establish a system of prohibitions, penalties, and correctional measures to deal with conduct that unjustifiably and inexcusably causes or threatens harm to those individual or public interests for which state protection is appropriate. To this end, provisions of this code are intended, and shall be construed, to achieve the following objectives: ... (3) to prescribe penalties that are proportionate to the seriousness of the offenses, and that permit recognition of the differences in rehabilitation and possibilities among individual offenders.

The first sentence of this provision codifies the concept that our criminal statutes are designed to protect individual and public interests. The clause under subdivision (3) codifies the concept that penalties must be keyed to the seriousness

of the offense. Appellant interprets the second prong of the *Prudholm* test to be a distillation of the stated goals of our penal laws. This prong seeks to insure that the out-of-state laws compared to ours protect comparable interests and treat the interests with comparable results. This Court thus created a test which would apply the Texas scheme of statutory construction to the out-of-state statutes to be compared with Texas statutes.

This Court explained in a long footnote to *Prudholm* that the phrase “substantially similar” is not ambiguous and that it was not necessary to resort to external factors to craft a definition. *Prudholm*, 33S.W.3d at 595 n. 21. However, the Court noted that application of similar statutes of other states supported its holding. *Id.* (citing *Heinemann v. State*, 12 P.3d 692, 698 (Wyo. 2000); *Robinson v. State*, 692 So.2d 883, 887 (Fla. 1997)).

The *Prudholm* rule states exactly what the law requires.

The State argues that the second prong of the *Prudholm* test is unnecessary because it “goes beyond what the statute requires.” (State’s Brief, 15-19). This argument lacks merit. Texas has rules of statutory construction for interpreting its own statutes. Texas does not have separate rules of construction for statutes of other states. *Prudholm* takes this fact into account and crafts a rule that interprets foreign laws which our legislature requires to be compared with Texas laws. The Texas “two strikes” law, TEX. PENAL CODE § 12.42(c), requires that the out-of-

state law be compared to the Texas law to determine whether they are substantially similar. A comparison with the Texas law requires that the purposes and objectives of the Texas law be taken into consideration. Otherwise, the comparison cannot be effective. A statute from another state which is substantially broader in its defined offenses than the comparable Texas statute is not substantially similar to the Texas statute. Nor is a foreign statute with a vastly different punishment range substantially similar. The differences in each situation are too great.

The State urges that Section 42.12(c)(2)(B)(v) should be strictly construed by this Court in determining “what the statute requires.” This ignores the construction rule stated in the Penal Code itself. TEX. PENAL CODE § 1.05(a), “Construction of Code,” provides:

The rule that a penal statute is to be strictly construed does not apply to this code. The provisions of this code shall be construed according to the fair import of their terms, to promote justice *and effect the objectives of this code.*

(emphasis added). The objectives of the Penal Code are set forth in Section 1.02, as quoted above.

The State’s argues that the comparison of interests protected and punishment ranges is problematic (State’s Brief, 16), and justifies its argument in a two-step analysis. The State argues first that “what one state considers important may not be given much consideration at all by another.” (State’s Brief, 16). This is precisely why a Texas court making a comparison needs a means of interpreting the foreign

statute. We have rules for determining the intent of the Texas Legislature. The present case compares the Texas sexual assault law with the UCMJ provision which criminalizes some of the same conduct. That provision was promulgated by the President based on duties delegated by Congress. *See* 10 U.S.C. § 856. The State's brief, at page 22, cites *United States v. Turner*, 30 M.J. 1276, 1283 (N.-M.C.M.R. 1990), for an explanation that the delegation fulfills responsibilities to provide for the nation's defense, jointly shared by the President and Congress. That fact, by itself, makes the military statute substantially different than the Texas statute, even while criminalizing some of the same behavior.

The second part of the State's argument is that "the expanded test ignores that, as the concerns of society change, statutory purposes and punishment ranges often modify over time." (State's Brief, 17). This is correct, but the military law as it existed in 1990 was the law under which Mr. Fisk was convicted (CR, 13), and should be the law that the courts compare with the Texas statute. In Texas, a defendant is tried under the law in effect at the time of the crime, without regard to subsequent changes in the law. *See Lindquist v. State*, 922 S.W.2d 223, 225 (Tex. App. – Austin 1996, pet. ref'd) (defendant tried for sexual assault under law in effect on date of offense rather than date of trial). In similar fashion, the comparison mandated by Section 12.42(c)(2)(B)(v) should compare the Texas law

to the law under which the defendant was actually convicted and sentenced, no matter how remote in time the conviction was.

***Stare decisis* requires that the *Prudholm/Anderson* rule be maintained.**

The State urges this Court to overrule a case that was decided seven years ago by a unanimous court, and that was reaffirmed five years ago by a unanimous court. The State offers no good reasons for this Court to do so. This Court does not frivolously overrule established precedent. *Febus v. State*, No. PD-1369-15, 2018 WL 850336 (Tex. Crim. App. Feb. 14, 2018) (designated for publication) (citing *Paulson v. State*, 28 S.W.3d 570, 571 (Tex. Crim. App. 2000)). This Court follows the doctrine of *stare decisis* “to promote judicial efficiency and consistency, encourage reliance upon judicial decisions, and to contribute to the integrity of the judicial process.” *Id.* The interests underlying this doctrine are at their height in judicial interpretations of legislative enactments where the parties seek guidance in conforming to those enactments. *Id.* (citing *Busby v. State*, 990 S.W.2d 263, 267 (Tex. Crim. App. 1999)). *Stare decisis* should give way only when a prior decision was poorly reasoned or unworkable. *Id.* *Prudholm* and *Anderson* were neither poorly reasoned nor unworkable. Indeed, simply because that precedent may not work to the State’s advantage in this case does not suddenly render it “unworkable.”

This Court should overrule the State’s first Issue.

State's Second Issue Presented for Review

Even if not disavowed, the court of appeal misapplied the current test when it concluded that the military's former sodomy-with-a-child statute is not substantially similar to Texas's sexual assault statute.

The findings of the court of appeals.

The court of appeals found that the State failed to establish that the elements of the former military sodomy law under which Mr. Fisk was convicted and the elements of the Texas sexual assault of a child statute shared a high degree of likeness. *Fisk v. State*, 538 S.W.3d at 774. It further concluded that the dangers to society and interests protected by the two statutes are not substantially similar. *Id.* The court did not conclude, however, that the punishment ranges were significantly different. *Id.*

Standard of review.

The question of substantial similarity is an issue of statutory construction, which the appellate court reviews *de novo*. *Harris v. State*, 359 S.W.3d 625, 629 (Tex. Crim. App. 2011).

Article 125.

10 U.S.C. § 925 (1968) provided in its entirety:

- (a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

(b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

The elements of the offense are: (1) that the accused engaged in unnatural carnal copulation with a certain other person or with an animal, and (2) that the act was done with a child under the age of 16. (RR 2, SX P-4).⁴ The first element is defined as follows: “It is unnatural carnal copulation for a person to take into that person’s mouth or anus the sexual organ of another person or an animal; or to place that person’s sexual organ in the mouth or anus of another person or of an animal; or to have carnal copulation in any opening of the body, except the sexual parts, with another person, or to have carnal copulation with an animal.” (RR 2, SX P-4). The maximum punishment, whether sodomy was with a child under the age 16 years or was by force without consent, is dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years. (RR 2, SX P-4).

TEX. PENAL CODE § 22.011 provides in pertinent part:

(a) A person commits an offense if the person:

(1) intentionally or knowingly:

(A) causes the penetration of the anus of sexual organ of another person by any means without that person’s consent;

⁴ This exhibit is taken from the Manual for Courts-Martial, United States, Part IV (1984 ed.), available online at https://www.loc.gov/rr/frd/Military_Law/pdf/manual-1984.pdf (last accessed on April 30, 2018). There is also a statutory element, not involved in this case that the act was done without the consent of the other person.

- (B) causes the penetration of the mouth or another person by the sexual organ of the actor, without that person's consent; or
- (C) causes the sexual organ of another person, without that person's consent, to contact or penetrate the mouth, anus, or sexual organ of any person, including the actor; or
- (2) intentionally or knowingly:
 - (A) causes the penetration of the anus of sexual organ of a child by any means;
 - (B) causes the penetration of the mouth of a child by the sexual organ of the actor;
 - (C) causes the sexual organ of a child to penetrate the mouth, anus, or sexual organ of another person, including the actor;
 - (D) causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor; or
 - (E) causes the mouth of a child to contact the anus or sexual organ of another person, including the actor.

***** ***** *****

(b) In this section:

- (1) "Child" means a person younger than 17 years of age.

***** ***** *****

(f) An offense under this section is a felony of the second degree, except that an offense under this section is a felony of the first degree if the victim was a person whom the actor was prohibited from marrying or purporting to marry or with whom the actor was prohibited from living under the appearance of being married under Section 25.01.

In addition to specifications under an article not related to this appeal, the court-martial order in Mr. Fisk's prior case contains one specification relating to Article 125. He was found guilty of that violation. (RR 1, SX P-3). The Article 125 specification under which he was convicted is so broadly stated that it is not

possible to determine what specific acts he committed. With the name of the victim omitted, the specification stated: “On diverse occasions between on or about 1 July 1988 and 28 May 1989, [Mr. Fisk did] commit sodomy with [NAME], a child under the age of 16 years.” (RR 2, SX P-3).

This military statute, taken together with its Manual for Courts-Martial explanation, is not substantially similar to Section 22.011 of the Texas Penal Code. The military statute is far broader than its Texas counterpart. Although the elements of the two statutes need not be parallel to one another to be substantially similar, they must criminalize a similar range of conduct. *Anderson*, 394 S.W.3d at 539, 536 n. 17 (analogizing the degree of overlap to a Venn diagram). Additionally, “the out-of-state sexual offense cannot be markedly broader than or distinct from the Texas prohibited conduct.” *Anderson*, 394 S.W.3d at 535-36. Both statutes criminalize sexual penetration and sexual contact with a child, and the same conduct with any person against the person’s consent. However, the military statute also criminalizes all “carnal copulation” in any opening of the body except the sexual parts. Thus, the statute criminalizes behavior that is not against the law in Texas. The military statute also embraces a whole range of bestiality offenses, which are completely absent from the Texas sexual assault law. In this regard, the military statute thus is both markedly broader and distinct from Section 22.011.

The Texas statute also goes into great detail defining consent, TEX. PENAL CODE § 22.011(b), while the military statute does not define the term. The Texas statute contains enumerated defenses not found in the military statute. It is a defense to sexual assault of a child that the conduct consisted of medical care and did not include contact between the anus or sexual organ of the child and the mouth, anus, or sexual organ of the actor or a third party. TEX. PENAL CODE § 22.011(d). The Texas statute also contains two affirmative defenses: (1) that the actor was the spouse of the child at the time of the offense, or (2) the actor was not more than three years older than the victim, was not required to register as a sex offender, and the victim was 14 years of age or older and was not a person whom the actor was prohibited by law from marrying. TEX. PENAL CODE § 22.011(e) (West 2011). Article 125 does not contain any provisions even remotely similar. There is not a “high degree of likeness” between these two statutes.

The second step in the analysis concerns the danger to society that each statute seeks to prevent. *Anderson*, 394 S.W.3d at 536. The interest protected by the Texas Penal Code sexual assault statute is to guard against “the severe trauma of rape.” *Castle v. State*, 402 S.W.3d 895, 905 (Tex. App. – Houston [14th Dist.] 2013, no pet.). The interests protected by Article 125 are harder to glean. The United States Court of Military Appeals addressed the legislative history of the statute, which was based in part on the law of the State of Maryland. Maryland’s

statute, from which the language of Article 125 was derived, “evinces ‘a clear legislative intention to cover the whole field of unnatural and perverted sexual practices.’” *United States v. Harris*, 8 M.J. 52, 57 (U.S.C.M.A. 1979) (finding that cunnilingus is covered by the Article 125, and is “equally revolting and merit[s] the same type of punishment and confinement” as fellatio, and quoting *Blake v. State*, 124 A.2d 273, 274 (Md. 1956)). The interests protected by Article 125 are much broader than those protected by Section 22.011. Therefore, in this prong, the two statutes are not substantially similar.

The third prong of the analysis concerns the impact of the elements on the seriousness of the offense. *Anderson*, 394 S.W.3d at 539. This generally compares the punishment available upon conviction. *See id.* at 540-41. Under Texas law, a conviction for sexual assault may be either a felony of the second degree or a felony of the first degree, depending on the circumstances. It is generally a second-degree felony, but becomes a first-degree felony if the victim was a person the actor was prohibited from marrying under the bigamy statute. TEX. PENAL CODE § 22.011(f). The second-degree punishment range is 2 – 20 years imprisonment and a possible fine not to exceed \$10,000. TEX. PENAL CODE § 12.33. The first-degree punishment range is imprisonment for life, or for any term on not more than 99 years or less than 5 years, plus a possible fine not to exceed \$10,000. TEX. PENAL CODE § 12.32. The military law makes no distinction between a victim under the

bigamy laws and any other victim. It contains a maximum sentence of 20 years, but no minimum. Because of the added bigamy provision, the maximum possible sentence in Texas for sexual assault is life, and is much higher than the maximum possible sentence in the military for sodomy. The military statute does not mention a fine, and the Texas statute makes no provisions for a dishonorable discharge or forfeiture of pay and benefits. As with the other two elements, this element is far from being substantially similar to Texas law.

The court of appeals correctly found that Article 125 was not substantially similar to the Texas sexual assault statute. This Court should affirm the judgment of the court of appeals and remand the case for a new punishment hearing. *Anderson*, 394 S.W.3d at 531.

Conclusion and Prayer

WHEREFORE, PREMISES CONSIDERED, the Appellant Walter Fisk prays the Court of Criminal Appeals to overrule the State's grounds for review and affirm the judgment of the court of appeals.

Respectfully submitted,

/s/ Michael D. Robbins

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Word Count Certificate of Compliance

Pursuant to TEX. R. APP. P. 9.4(i)(1) & (i)(2)(B), the word count, from the beginning of the Statement of Facts until, but excluding, the signature block, is 3,911. The total word count is 5,279. The Bexar County Public Defender's Office uses Microsoft Word 2010 and Westlaw.

/s/ Michael D. Robbins
MICHAEL D. ROBBINS
Assistant Public Defender

Certificate of Service

I HEREBY CERTIFY that, pursuant to Rules 9.5 and 68.11 of the Texas Rules of Appellate Procedure, a true and correct copy of the above and foregoing Brief for Appellant has been emailed to: (1) Mr. Andrew N. Warthen, Assistant District Attorney, Paul Elizondo Tower, 101 W. Nueva St., Suite 710, San Antonio, Texas 78205, awarthen@bexar.org; and (2) State Prosecuting Attorney, P.O. Box 12405, Austin, Texas 78711, information@spa.texas.gov; on May 8, 2018.

/s/ Michael D. Robbins

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